California Restaurant Association v. City of Berkeley and the continuing opportunities for building codes to drive deep decarbonization and energy efficiency

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ABSTRACT

California Restaurant Association v. City of Berkeley (*California Restaurant Association)* changed the preemption landscape: it created a slippery slope of legal reasoning around building standards that were traditionally not considered preempted; eliminated the presumption against preemption that previously guided judicial interpretations of EPCA; and removed a key tool for achieving large-scale decarbonization – local ordinances that banned gas in new construction.

This paper first explains the court's ruling in *California Restaurant Association* and its effects on similar local ordinances in the Ninth Circuit. It then analyzes the remaining opportunities for building codes in the Western U.S. post-*California Restaurant Association* to achieve deep decarbonization and energy efficiency, using select examples of code proposals that have been successful so far. Specifically, this paper examines the approaches taken in the Washington State Energy Code, local reach codes, and California Energy Code (Title 24, Part 6), as illustrative examples of achievement despite the setback in *California Restaurant Association*. Finally, this paper assesses the long-term policy implications of the case. Note, this paper does not provide legal advice or analysis of any specific building code proposals.

Introduction

California Restaurant Association v. City of Berkeley, 65 F.4th 1045, *amended* 89 F.4th 1094 (9th Cir. 2023) (*California Restaurant Association*) changed the legal and political landscape for states and local governments seeking to decarbonize buildings by prohibiting or removing fossil-fuel-burning appliances. Nonetheless, the case left open opportunities for continued decarbonization, as demonstrated in building code activities that both preceded and followed the case. This paper provides a brief background leading up to the case, analyzes the court's ruling, examines select state and local efforts in the Ninth Circuit to advance decarbonization goals in compliance with a changed preemption landscape, considers ongoing implications of the case, and concludes with areas for further research.

Understanding *California Restaurant Association*

The Energy Policy and Conservation Act

The Energy Policy and Conservation Act and its amendments (EPCA) (42 U.S.C. § 6291 et seq.) both establish and require the U.S. Department of Energy (DOE) to establish, review, and update energy conservation standards for specified products and equipment, including many products that use gas combustion technology, such as furnaces, boilers, water heaters, clothes dryers, and residential cooking products. These federal appliance standards preempt state and local energy use or energy efficiency standards for the appliances, unless an exception applies. Common exceptions include:

1. Product-specific exceptions in the statute;
2. Exceptions for state standards before a federal standard has taken effect;
3. Appliance regulations in building codes that meet seven statutory criteria; and
4. DOE-granted waivers to states (although no such waiver exists). (42 U.S.C. § 6297.)

DOE has established updated efficiency standards for furnaces, boilers, water heaters, and clothes dryers, and has proposed standards for residential gas cooking products. EPCA effectively prohibits DOE from banning the sale of gas-combustion appliances. EPCA also creates separate efficiency standards for gas and electric products, each with different efficiency requirements. As a result, federal appliance standards do not and cannot prohibit gas-combustion appliances absent a change in statute.

Berkeley's Ordinance

In 2019, the City of Berkeley passed an ordinance as part of its health and safety code prohibiting piping natural gas from the meter to the building. (City of Berkeley, Ordinance No. 7672-N.S.) The stated purpose of the ordinance was to eliminate obsolete natural gas infrastructure, eliminate greenhouse gas emissions in new buildings where all electric infrastructure is practicable, and reduce environmental and health hazards from consuming and transporting natural gas. (Berkeley Municipal Code (BMC) § 12.80.010.) The ordinance contained an exemption for "public interest" and for where it was "not physically feasible" to comply. (BMC §§ 12.80.050, 12.80.040.) Berkeley's authority for this ordinance was under its police power, which is its general governmental authority to legislate in the public interest. (Cal. Rest. Ass'n v. City of Berkeley, 547 F. Supp. 3d 878, 883 (N.D. Cal. 2021).)

District Court's Decision

The California Restaurant Association sued the City of Berkeley in federal district court, arguing that Berkeley's law was: (1) preempted by EPCA (a claim under federal law), (2) preempted as void and unenforceable exercise of police power, (3) preempted as conflicting with the California Building Standards Code, and (4) preempted as conflicting with the California Energy Code (all state law claims). (*Cal. Rest. Ass'n*, 547 F. Supp. 3d at 881.)

The District Court ruled only on the first claim and found that EPCA does not preempt Berkeley's ordinance. The court dismissed the remaining claims because it lacked jurisdiction absent the federal claim.

Appellate Court's Decision and *En Banc*

On appeal, the U.S. Court of Appeals for the Ninth Circuit first determined that the California Restaurant Association had standing to bring the case. In federal courts, plaintiffs must demonstrate that they have standing under Article III of the U.S. Constitution to bring the case. Standing essentially ensures that the plaintiff has a real stake in the case. To have standing in federal court, the plaintiff must show: (1) harm ("injury") that is concrete and particularized and actual or imminent (not conjectural or hypothetical), (2) that the harm is fairly traceable to the challenged action, and (3) a favorable decision is likely to redress the harm. (*Nat. Res. Defense Council v. U.S. EPA*, 735 F.3d 873 (9th Cir. 2013).)

Berkeley argued that the California Restaurant Association did not show that their harm was actual or imminent. The California Restaurant Association argued that their members were based in Berkeley, did business using natural gas stoves, and would like to open or relocate a restaurant in Berkeley in a new building and would not be able to do so because of Berkeley's ordinance. Notably, the California Restaurant Association did not allege that any of its members had actually attempted to open or relocate a restaurant, or when they might do so.

The Ninth Circuit found that the California Restaurant Association had "easily established standing" because there was a credible threat of probabilistic harm, even though no member had actually suffered any harm yet and even though the association did not actually indicate which member would imminently suffer such harm (as noted in Judge Baker's concurring opinion expressing reservations about whether the California Restaurant Association had established standing). (*California Restaurant Association*, 89 F.4th at 1100.)

The court then determined that EPCA preempts Berkeley from banning natural gas piping in buildings. Finding that no presumption against preemption[1] applies, the court held that EPCA's plain language preempts regulations that related to the quantity of natural gas directly consumed by covered products at the point of use, and that states and localities cannot do *indirectly* what Congress says they can't do *directly*. (*Id.* at 1107.) The court therefore held that Berkeley's ordinance was preempted because it prohibited natural gas infrastructure in buildings where covered natural gas products are used. (*Ibid.*) The court further stated that preemption is not limited to facial regulations on appliances or to energy conservation standards, that the ruling is not an implied repeal of the Natural Gas Act, and that cities or utilities could still decide whether or not to deliver gas to the meter in the first instance. (*Id.* at 1103, 1106.)

In an intriguing concurring opinion, Judge O'Scannlain lamented the breadth of the Ninth Circuit's application of the Supreme Court's purported elimination of the presumption against preemption where preemption is explicit (as is also the case in EPCA). Judge O'Scannlain explained that the Ninth Circuit previously had several cases that applied a presumption against preemption under EPCA and noted that courts have interpreted the Supreme Court's opinion in *Puerto Rico v. Franklin California Tax-Free Trust*, 579 U.S. 115 (2016), more narrowly than the Ninth Circuit has apparently done. Given the "troubling and confused" area of law, Judge O'Scannlain welcomed additional guidance from the Supreme Court on how to handle presumptions against preemption. (*Id.* at 1107-1113.)

Although Berkeley sought an *en banc*[2] rehearing, the Ninth Circuit declined, leaving the panel's decision in place. In a rare dissenting opinion on the denial of rehearing, Judge Friedland, joined by seven other judges, warned future courts not to make the same mistakes of statutory interpretation made by the court.[3] (*Id.* at 1119.) Specifically, Judge Friedland expressed concern about the panel giving words "colloquial meaning" instead of their intended "technical meanings," resulting in an erroneous ruling on Berkeley's authority that would have long-reaching impacts on the ability of states and local governments to address climate change. (*Id.* at 1120.) Judge Friedland argued that, contrary to the panel's opinion:

[1] A presumption against preemption effectively puts a thumb on the scale against finding that a state or local law is preempted. Thus, eliminating that presumption means the court takes a "neutral" look at whether a state or local law is preempted.

[2] An *en banc* is a rehearing by the full Ninth Circuit of the three-judge panel's decision.

[3] Three additional judges supported the dissent in a separate statement.

- "Energy use" means the total energy consumption of an appliance in terms of performance standards, not the ability of a consumer to use energy (*id.* at 1122);
- "Point of use" is a reference to site energy (as opposed to source energy), not the consumer's ability to use an appliance (*id.* at 1124-1125);
- "Concerning" does expand preemption beyond a direct regulation on an appliance (such as to a building code) but does not change the meaning of other terms, like "energy use," to give them a broader meaning (*id.* at 1125-1126).

The dissenting opinion does not have any effect on the immediate case or Berkeley's ordinance but may provide an alternative to courts outside of the Ninth Circuit on how to interpret EPCA's preemption provisions.

Settlement

Following the denial of rehearing, Berkeley agreed to repeal the ordinance. (California Restaurant Association 2024.)

Immediate Impacts

The Ninth Circuit ruling only applies in states in the Ninth Circuit's jurisdiction (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and Northern Mariana Islands). Courts in other circuits may consider the Ninth Circuit's reasoning but are not required to follow it. One issue in particular that may be unique to the Ninth Circuit is how it handles the presumption against preemption, even though the Circuit court also said (somewhat disingenuously in this author's opinion) that it would not have mattered if the presumption had applied. Another issue is how another court might interpret EPCA given the alternative interpretation proposed in the dissenting opinion.

The case also does not apply to laws and codes that were not specifically addressed in the case. Therefore, regulations that comply with EPCA's exception for building codes, air emissions-based standards, and laws regulating natural gas before it gets to the meter are not directly affected by the case. Again, however, the court's reasoning in the case could be considered in ruling on these other laws.

For state and local governments in the Ninth Circuit, the ruling effectively invalidates statutes and ordinances that are similar to the Berkeley ordinance. Some local governments that had previously adopted all-electric building codes have held off on enforcement. (City of Palo Alto 2024; Contra Costa County 2024.) Others have considered alternative reach code pathways, discussed further below, that may withstand a preemption challenge after the case.

Options for Decarbonization in Building Codes

EPCA exempts building codes that set standards for federally covered appliances if they meet seven criteria (as paraphrased from 42 U.S.C. § 6297(f)(3)):

(A) **Combination of efficiency measures:** The code allows a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined efficiencies meet the objective;

(B) **Minimum efficiency appliances permitted:** The code does not require higher efficiency appliances than federally required unless a state waiver applies;
(C) **Credits on a one-for-one basis:** The credit for installing higher efficiency appliances is on a one-for-one equivalent energy use or equivalent cost basis;
(D) **Baseline building uses minimum efficiency products:** If the code uses a baseline building design that includes a covered product, the baseline building design is based on a minimum efficiency covered product;
(E) **At least one minimum efficiency combination:** If the code provides for one or more combinations of items to meet the energy consumption or conservation requirement, at least one combination must include a covered product that does not exceed the federal appliance standard by more than 5 percent and/or at least one combination must include a covered product that meets but does not exceed the minimum efficiency standard.
(F) **Performance pathway:** The building energy consumption or conservation target is specified in terms of an estimated total consumption of energy (which may be calculated from energy loss- or gain-based codes) utilizing an equivalent amount of energy (which may be specified in units of energy or its equivalent cost).
(G) **Uses federal test procedures:** The estimated energy use of any covered product is determined using the applicable federal test procedure, adjusted to account for local climate conditions as per the federal test procedure or other technically accurate documented procedure.

States and local jurisdictions have taken different approaches to using these building code preemption exceptions. A few are analyzed below in the context of the court's discussion in *California Restaurant Association*.

Washington: Site Energy with Efficiency Credits

Before the court's decision in *California Restaurant Association*, Washington State had adopted a building code that required heat pump technologies to be used in commercial buildings. After the Ninth Circuit decision, two lawsuits were filed challenging the state's effective prohibition of fossil fuel appliances in these buildings, as the Ninth Circuit's decision indicated that an outright ban on the use of a minimally efficient gas appliance was preempted. In response, Washington considered and ultimately adopted a code change proposal that created two prescriptive pathways to compliance: a fossil fuel compliance pathway and a heat pump compliance pathway. Because fossil fuel appliances were less efficient on a site energy basis than their heat pump counterparts, the code provided for additional efficiency credits that would be required for fossil fuel appliances to achieve the equivalent efficiency of heat pumps. (Jonlin et al. 2024)

The Washington approach took advantage of the inherent inefficiency of fossil fuel products compared to their heat pump counterparts to establish a credit system that required a significant amount of additional efficiency improvements, making a building using the fossil fuel compliance pathway more expensive to build than a building using the alternative heat pump pathway. Because the building code exception to preemption only requires that the *energy* costs be equivalent between the pathways, and says nothing of the *construction* costs, Washington was able to ensure that the code met the explicit exception to preemption for building codes that regulate appliances, provide a pathway for installing fossil fuel appliances, and simultaneously

disincentivize use of that pathway by increasing the cost to comply with that approach due to the need to incorporate additional efficiency credits to meet the equivalent heat pump efficiencies. Washington also avoided some clear political traps in its careful development of the code. For example, Washington's building code does not prohibit the use of gas cooking products, which is a politically sensitive issue. It also does not apply to building types for which the state has not yet conducted appropriate modeling to verify the building's annual energy use under the two pathways, instead ensuring that the included building types had a rigorous analytical basis for the calculation of additional efficiency credits.

California: Source Energy with Time-Dependent Cost of Energy

California has long used time-dependent valuation (TDV) to create a means to assess one-for-one energy costs in the code consistent with 42 U.S.C. § 6297(f)(3)(C). However, because fossil gas has historically been lower cost in the state and, until relatively recently, cleaner and more efficient than the carbon mix in California's electricity portfolio, California's Energy Code largely incentivized the use of gas combustion appliances in buildings. This has complicated decarbonization efforts in the state's building code. For the 2022 Energy Code, California made a significant step toward decarbonizing buildings by adding a source energy metric to TDV, thus counting the costs of energy from cradle-to-grave even if those costs were not adequately reflected in projected fuel rates.

TDV, and now source energy, clearly complies with the building code exception to preemption. As the state continues to evaluate energy impacts on a source energy basis, it can continue to incentivize appliances that rely on cleaner energy sources.

However, *California Restaurant Association* will make it challenging to outright prohibit the installation of fossil fuel appliances in new buildings, even under a source energy approach. In addition, TDV and source energy are complicated to develop and model compared with simply adopting a national model code like ASHRAE 90.1 or the International Energy Conservation Code (IECC), as some states have traditionally done. Although an EPCA-compliant pathway, California's state energy code approach may be overly complex for other states or for most local jurisdictions.

All-Electric Reach Codes

In several states, local governments may adopt more stringent energy codes than those promulgated by the state government. These local codes are called "reach codes." Before *California Restaurant Association*, several local governments had adopted all-electric energy codes that required newly constructed buildings to be all-electric. However, *California Restaurant Association* created concern that the Ninth Circuit's reasoning would also apply to overturn all-electric building codes, even though such codes were not specifically addressed in the case. As a result, many local jurisdictions declined to enforce their all-electric building codes or held off on adopting them all together.

California Restaurant Association does not directly invalidate all-electric codes. A fair argument could be made that even though these codes prohibit natural gas appliances, they do meet the requirements for the building code exception to preemption:

(1) **Combination of efficiency measures:** All electric codes allow for the combination of efficiencies to meet their objectives;

(2) **Minimum efficiency appliances permitted:** The code does not require higher efficiency electric appliances than federally required unless a state waiver applies;
(3) **Credits on a one-for-one basis:** The credit for installing higher efficiency electric appliances is on a one-for-one equivalent energy use or equivalent cost basis;
(4) **Baseline building uses minimum efficiency products:** If the code uses a baseline building design that includes a covered product, the baseline building design is based on a minimum efficiency covered product that is electric;
(5) **At least one minimum efficiency combination:** If the code sets forth one or more combinations of items to meet the energy consumption or conservation requirement, at least one combination includes minimally efficient covered products that are electric;
(6) **Performance pathway:** The performance pathway is in terms of total energy consumption; and
(7) **Uses federal test procedures:** The estimated energy use is based on federal test procedures.

However, if local jurisdictions provide no pathway for minimally efficient fossil fuel appliances to be installed, the court's reasoning in *California Restaurant Association* could be expanded to read a new requirement into the building code exception to preemption that requires the building code to provide at least one pathway for all types of minimally efficient appliances, not just electric-only ones. Because of the legal uncertainty with this approach, and in response to concerns raised by their communities, many jurisdictions that had adopted all-electric reach codes had suspended enforcement and are considering alternative code pathways. (City of Palo Alto 2024; Contra Costa County 2024.)

Electric Space-Heating and Water-Heating Reach Codes

Some local governments have adopted reach codes that require space- and water-heating to use electric appliances and require electric-ready buildings but allow natural gas cooking and fireplaces. (City of Healdsburg 2022) These types of reach codes have a similar legal basis and risk as all-electric reach codes, but because they offer exceptions for natural gas cooking and fireplaces, these reach codes address some of the concerns of restaurants and homeowners who prefer natural gas stoves for cooking, reducing the likelihood that someone will bring a legal challenge.

Source Energy Reach Codes

Some local governments have adopted source energy codes that have the effect of incentivizing appliances that rely on electricity instead of natural gas due to the lower source energy costs of electricity compared to natural gas. These codes are consistent with California's TDV plus source-energy performance pathway. Such a code would require natural gas-based buildings to undertake additional efficiency measures to meet the same energy targets. These codes have long been considered to meet the building code exception to preemption and, because they do not prohibit the installation of natural gas appliances, they can offer a lawful pathway to decarbonization even after *California Restaurant Association.*

For example, the City of San Jose adopted a source energy code provision that amends the performance approach for nonresidential occupancies to require a "source energy use compliance margin" relative to the standard building design. (Romanow and Burton 2023, 4)

The resulting code permits both all-electric and mixed-fuel designs but tends to result in all-electric designs being more cost-effective as these buildings require more energy efficiency but less solar generation and/or battery storage to meet the compliance margin. (PG&E 2024)

It can be complicated to develop a source energy metric in the first instance, so source energy codes are more feasible in states that already use a source energy metric, where existing analytical and modeling tools are available for assessing impacts and verifying compliance. In addition, both the California investor-owned utilities and Bay Area community choice aggregators have provided model ordinances for California local governments to adopt a source energy reach code, making it easier for cities to adopt. (PG&E 2024; Peninsula Clean Energy 2024.)

Long-Term Policy Implications

Eliminating the Presumption against Preemption

Cases challenging state efficiency standards and building codes under EPCA's preemption provisions have historically applied a presumption against preemption, and in doing so, found that state and local regulations were not preempted. For example, in *Air-Conditioning and Refrigeration Institute v. State Energy Resources Conservation and Development Commission*, 410 F.3d 492 (9th Cir. 2005), the Ninth Circuit found that the California Energy Commission's requirements that manufacturers (a) disclose the energy efficiency and energy use of covered products to the state's database, (b) mark the appliances with manufacturer name, model number, and manufacturer date, and (c) be subject to related compliance and enforcement rules, were *not preempted* under EPCA. In that case, the court applied a presumption against preemption, essentially creating a higher bar to challenges against state regulations under EPCA's preemption provisions. *California Restaurant Association* casts into doubt the decision in *Air-Conditioning and Refrigeration Institute* (although this author believes the *ARI* court would still reach the same conclusion even absent the presumption).

California Restaurant Association also changes the analysis that state and local governments would undertake when considering regulations or ordinances that directly or indirectly regulate federally covered appliances, at least in the Ninth Circuit. Whereas previously a presumption against preemption would cause a court to find in favor of the state or local government, all else being equal, the lack of such a presumption causes uncertainty as to how a court may interpret EPCA's preemption provisions, or the exceptions to preemption. States and local governments no longer get the benefit of the doubt.

California Restaurant Association may also breathe new life into a 2010 federal district court decision in *Air-Conditioning, Heating, and Refrigeration Institute v. City of Albuquerque*, 835 F. Supp. 2d 1133 (D. NM 2010). In that case, AHRI sued Albuquerque after the city adopted changes to their building code to provide two performance-based compliance paths and one prescriptive compliance path for commercial and multifamily buildings. Only the performance pathways would allow for installation of minimally efficient appliances; the prescriptive pathway required higher efficiency appliances. The court's decision came after a preliminary motion (a motion for partial summary judgment), so the court did not make any findings of fact in support of its decision. Without addressing whether the presumption against preemption applied and without analyzing the construction of the building code exception to preemption, the court found that Albuquerque's prescriptive pathway was preempted because it did not allow for minimally

efficient appliances, even though the performance pathways would allow for installation of such appliances.

This case has had little or no application outside of the Albuquerque building code at issue, given the specificity of the code provisions at issue and the procedural posture of the case. However, *California Restaurant Association* may cause litigants to take a fresh look at this case to argue that codes that prohibit or require higher efficiency federally regulated appliances in the prescriptive pathway are preempted even if minimally compliant appliances could be installed under the performance approach.

A Slippery Slope

In language that is not intended to be binding on future courts, the Ninth Circuit stated that Berkeley could not do indirectly what it could not do directly – it could not prohibit the use or installation of gas appliances that were regulated under federal appliance standards. The City of Berkeley along with many other petitioners for en banc raised concerns that this language could lead to a slippery slope, preventing many kinds of state and local regulations that effectively prohibit the use of certain appliances subject to federal appliance standards for reasons unrelated to energy efficiency. For example, Berkeley argued that the case's reasoning could apply equally to all-electric building codes, fire codes that prohibit unvented gas appliances, emissions-based standards, and time-of-use (demand response) restrictions. As such, the case could have a chilling effect on governments attempting to address climate change through regulations that may have indirect effects on the use of federally regulated appliances.

In an amended opinion filed after the petition for review was denied, the court added language to clarify the intended narrowness of its opinion: "We conclude only that EPCA applies to building codes and that Berkeley's Ordinance falls with the Act's preemptive scope." (*California Restaurant Association*, 89 F.4th at 1101.) The court added language throughout its amended opinion to specify that the court was invalidating *a building code provision* under EPCA's preemption provision. However, nothing in the court's legal reasoning limits the case to building code provisions or clarifies what is a "building code" versus some other type of regulation that affects a covered appliance. Indeed, the lower court in the case took care to distinguish Berkeley's ordinance from building codes, calling it a public health and safety regulation that was separate from Berkeley's building code and energy code. (*Cal. Rest. Ass'n v. City of Berkeley*, 547 F. Supp. 3d at 883.)

Thus, this slippery slope argument could carry significant weight for policy makers, as it is not clear where a future court might draw the line. If an agency prohibits the installation of a gas appliance because it emits NOx, is it still preempted even though the agency is not attempting to regulate the energy use or energy efficiency of the appliance, since it is an appliance regulation that has the effect of preventing a consumer from using a minimally compliant federally regulated appliance? If an agency requires the installation of a minimally compliant heat pump in a building as part of its prescriptive building code, and remains silent on whether the building can also include an air conditioner and furnace, has the agency effectively prohibited the installation of a minimally compliant federally regulated appliance? If an agency regulates *when* an appliance operates as part of a demand response program, has it regulated "energy use" in a way that violates preemption because it does not permit the consumer to use the energy in whatever amount and whenever the consumer wants?

An Authority Void

EPCA prevents DOE from prohibiting the use of natural gas appliances, even if they are less efficient than their electricity-using counterparts. As a result, DOE must set separate efficiency standards for appliances based on their fuel source. *California Restaurant Association*, in preventing state and local governments from directly *or indirectly* prohibiting the use of natural gas appliances, thus cannot do what DOE also cannot do. While it is not unusual for the federal government to preempt states from taking action even in the absence of federal action, it is unusual for the federal government to do so in an area of traditional state regulation, or without a clear indication from Congress that it intended preemption to work in such a way.

This authority void may become even more pressing if Congress successfully uses the Congressional Review Act on efficiency standards for natural gas appliances. For example, on May 21, 2024, the Senate passed a joint resolution to disapprove DOE's standard for residential gas furnaces, "Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Department of Energy relating to 'Energy Conservation Program: Energy Conservation Standards for Consumer Furnaces.'" (S.J.Res. 58, 118th Cong. (2024)) Even though the resolution must still be passed by the House, the Biden administration has already stated that it would veto the resolution. (OMB 2024) However, with more rules continuing to be finalized this year, it is possible that a well-timed Congressional Review Act bill could coincide with a change in the administration and take effect. If this happens, then not only does that standard no longer take effect, but the DOE is also prohibited from reissuing a new rule "that is substantially the same." (5 U.S.C. § 801(b); Congressional Research Service 2023.) Although what is "substantially the same" is not defined in statute, this would certainly result in weakened efficiency standards for these products – all while preempting states and local jurisdictions from addressing the gas use of these products to address public health concerns with localized impacts, including indoor air quality, criteria pollutant pollution, and climate change.

Potential for Conflicting EPCA Interpretations

The Ninth Circuit opinion and the dissenting opinion from the denial of a rehearing present two conflicting interpretations of EPCA and its preemption provisions. Because circuit court opinions are not binding on other circuits, a court in another circuit may find the dissenting opinion persuasive and adopt an interpretation of EPCA that conflicts with the Ninth Circuit opinion to uphold a similar ordinance or regulation in another state. Inter-circuit splits in opinion like this could provide an opportunity for the U.S. Supreme Court to weigh in on an appropriate interpretation of EPCA, a prospect that appears undesirable under the current makeup of the court. It would also complicate state and local efforts, as states and local governments could not learn from what is effective in other jurisdictions if they are subject to different EPCA preemption regimes.

A split in court opinions would also create challenges for national model building codes, like the International Energy Conservation Code and American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) Standard 90.1, as provisions affecting covered appliances in these codes may be preempted in some states but not others. ASHRAE has committed to reaching net zero carbon and net zero energy in its Standard 90.1 by 2031 (ASHRAE 2022), an effort that the case and the potential for conflicting opinions in other states greatly complicates.

Conclusion and Further Research

California Restaurant Association eliminated an outright ban on new natural gas connections in buildings as an option for decarbonization in buildings. However, other opportunities remain available, applying both EPCA's building code exception to preemption and the broad expansion of preemption in the Ninth Circuit's ruling. These include careful modeling of site energy to create a fossil fuel compliance pathway that is balanced with additional energy efficiency credits on a one-for-one energy use basis; applying an energy cost metric and source energy approach to compare and equalize the real environmental, social, and societal costs of different fuel sources, and local source energy codes. Although none of these outright prohibits natural gas appliances in buildings, they disincentivize builders from including natural gas appliances by requiring builders to rectify the real impacts of those appliances through additional energy efficiency measures.

The longer-term fallout from the case remains to be seen. By eliminating the presumption against preemption, the case not only calls into question other Ninth Circuit decisions that relied on the presumption; it also changes the legal analysis that states and local governments will undertake in considering preemption issues, as they will no longer receive the benefit of the doubt in a court's preemption analysis. The court expanded preemption to an indirect regulation of energy use, creating uncertainty as to whether other indirect regulations of appliances are valid or not under EPCA's preemption provisions. Finally, the court created a regulatory void, where neither DOE nor the states can prohibit the sale, installation, or use of natural gas appliances regardless of their efficiency, environmental impacts, or harm to human health. These remaining issues will complicate how state and local governments analyze preemption risks and will only be resolved with further legal proceedings or through an act of Congress.

Many of the building code options considered in this paper are only recently adopted. One area for further study is on how many buildings use the all-electric versus fossil-fuel compliance pathways when the code allows for both, to understand the cost drivers that may incentivize one building type over another. Such research could also compare jurisdictions that have taken an education and outreach approach to advancing all electric buildings as optional rather than mandatory requirements. Additional research could examine building code decarbonization measures outside the Ninth Circuit as well as any legal challenges those measures face. A nationwide perspective on these decarbonization issues would help inform national model codes as well as assess the appetite for federal action or legislation to address the challenges states and local governments are facing. Finally, this paper focuses on building code options for decarbonization after *California Restaurant Association*, but commentators have considered other options, like emissions-based appliance and building standards, which could benefit from additional legal analysis and technical research.

References

ASHRAE. 2022. ASHRAE Position Document on Building Decarbonization (June 26, 2022). Accessed May 30, 2024. https://www.ashrae.org/file%20library/about/ashrae_building_decarbonization_pd_2022.pdf.

California Restaurant Association. 2024. Press Release: California Restaurant Association and Berkeley Settle Gas Ban Lawsuit: Berkeley Will Not Enforce Its Ban (March 22, 2024).

Accessed May 30, 2024. https://www.calrest.org/news/california-restaurant-association-and-berkeley-settle-gas-ban-lawsuit-berkeley-will-not-enforce.

City of Healdsburg. 2022. Ordinance No. 1217 An Ordinance of the City Council of the City of Healdsburg Amending Healdsburg Municipal Code Section 15.04.080, California Energy Code Amendments to Adopt an Amended Electrification Reach Code (September 19, 2022). Accessed May 30, 2024. https://www.ci.healdsburg.ca.us/DocumentCenter/View/15534/Healdsburg-2022-Electrification-Reach-Code.

City of Palo Alto. 2024. Adoption of a Resolution Suspending Enforcement of Municipal Code Sections 16.14.090, 16.14.110, and 16.14.300 Requiring All-electric Construction and Direction to Staff to Commence Work on Local Amendments to the California Energy Code Establishing a One Margin Standard. CEQA Status – Not a Project (February 26, 2024). Accessed May 30, 2024. https://cityofpaloalto.primegov.com/Portal/viewer?id=0&type=7&uid=8ac11983-10ba-4a79-a823-3693203c22d7.

Congressional Research Service (CRS) 2023. The Congressional Review Act (CRA): A Brief Overview (February 27, 2023). Accessed May 30, 2024. https://crsreports.congress.gov/product/pdf/IF/IF10023.

Contra Costa County. 2024. Meeting Minutes – Final: Contra Costa County Board of Supervisors (February 27, 2024). Accessed May 30, 2024. https://contra-costa.legistar.com/View.ashx?M=M&ID=1171439&GUID=7C7353B1-1BD8-43C3-BB4E-59CD2BF2F8EE.

Jonlin, D., N. Bulger, S. Surana, and K. Driskell. 2024. Energy Code Decarbonization Pathway to Accommodate the Ninth Circuit Court Ruling. Publication Pending.

Office of Management and Budget (OMB). 2024. Statement of Administration Policy (May 21, 2024). Accessed May 30, 2024. https://www.whitehouse.gov/wp-content/uploads/2024/05/SAP-SJRes58.pdf).

Pacific Gas and Electric Company (PG&E), San Diego Gas and Electric Company, and Southern California Edison. 2024. Reach Code News Brief: Special Edition. Accessed May 30, 2024. https://localenergycodes.com/content/special-edition-1.

Peninsula Clean Energy, Silicon Valley Clean Energy, and East Bay Community Energy. 2024. Building Electrification & EV Infrastructure Reach Code Initiative. Accessed May 30, 2024. https://bayareareachcodes.org/.

Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Department of Energy relating to ‘‘Energy Conservation Program: Energy Conservation Standards for Consumer Furnaces,’’’ S.J. Res. 58, 118th Cong. (2023). https://www.congress.gov/118/bills/sjres58/BILLS-118sjres58is.pdf.

Romanow, K. and C. Burton. 2023. Memorandum: San Jose Building Reach Code Administrative Update (August 30, 2023). Accessed May 30, 2024. https://localenergycodes.com/download/1702/local_government_adoption_staff_report/fieldList/2022%20San%20Jose%20-%20%20Staff%20Report.pdf.